IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22157

HAROLD FRANKLIN SMITH and AUBREY LEE CRUMLEY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(February 3, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

PER CURIAM: Appellants were two of six defendants charged in a seven-count indictment with illicit liquor operations. Appellant Smith was convicted on all seven counts, and Appellant Crumley, who was charged in Counts 2 through 7, was convicted on Counts 2, 3, 4, 6 and 7.

Appellants complain of the action of the District Court in overruling their motions for judgment of acquittal because of the absence of substantial evidence to support the jury's verdict. Appellant Crumley further asserts as error a part of the Court's charge on aiding and abetting.

Smith was arrested when a rather large unregistered distillery in Clark County, Georgia, was raided by Internal Revenue agents, after he had been observed working at the still. A box of his clothes was also found in the barn housing the still. Smith testified that he was merely looking over the operation in order to determine whether he would agree to work there, and admitted three prior convictions for violation of Internal Revenue laws relating to non-tax-paid whiskey.

Appellant Crumley was identified as the man who purchased the license plate later found on a truck involved in the operation. He was arrested on a road near the still after he drove a car which contained sugar and bran remnants and fruit jar labels toward the still location, then suddenly backed the car rapidly down the road when he saw the agent's car. His car became stuck in a ditch and he attempted to flee.

Crumley urges that the statutory presumptions of 26 U.S.C. 5601(b)(1) and (2) cannot be applied to uphold his conviction since he was never present at the still site.[1] However, the District Court did not give the jury here any instructions as to such presumptions, but merely charged that the presence of a defendant at a still, if so found, is a circumstance to be considered along with all

1. The Supreme Court has upheld the validity of the presumption in Section 5601(b)(2), *U. S.* v. *Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), and has invalidated the presumption in Section 5601(b)(1) in *U. S.* v. *Romano*, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (Nov. 22, 1965).

the other testimony in the case. Since this record shows that there was substantial evidence upon which the jury could find both Appellants guilty of respective counts upon which they were convicted beyond a reasonable doubt the District Court was clearly correct in overruling their motions for judgment of acquittal.

The excerpt from the Court's charge assigned as error by Crumley instructed the jury that one "may be considered as having aided and abetted the commission of the crime if what he did made and tended to cause its commission." However, considering the instruction to the jury as a whole, it is apparent that the Court charged fully and correctly that the participation must be knowingly, purposely, intentionally and willfully done, and the jury could not have been confused by these instructions. There was substantial evidence to support these convictions, and no prejudicial harm resulted from the Court's charge.

AFFIRMED

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FOR THE FIFTH CIRCUIT

No. 22157

HAROLD FRANKLIN SMITH and AUBREY LEE CRUMLEY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(April 1, 1966.)

On Petition for Rehearing

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

PER CURIAM: Petitioners urge that in its opinion of February 3, 1966, this Court overlooked certain contentions and previous decisions.

As to the identification of Crumley by the deputy tax collector as the man who bought a license plate which later appeared on a truck delivering raw materials to the distillery in question, Petitioner Crumley contends that it lacked probative value.

The identification of Crumley on direct examination was weakened somewhat when the witness stated on cross-examination that although Crumley certainly resembled the man, he was seen only one time for a few minutes and the witness declined to positively identify him. This testimony merely presented questions of weight and credibility, and cannot be said to be devoid of probative value when considered with the other evidence in the case.

Petitioners re-urge four cases decided by this Court in support of the allegation that the evidence was insufficient to support these convictions, particularly as to Crumley. *McFarland v. U.S.*, 5 Cir. 1960, 273 F. 2d 417; *Fowler* v. *U.S.*, 5 Cir. 1956, 234 F. 2d 697; *Matthews, et al* v. *U.S.*, 5 Cir. 1949, 177 F. 2d 278; and *Cantrell* v. *U.S.*, 5 Cir. 1946. 158 F. 2d 517.

In *McFarland*, we affirmed a conviction on a stronger case than that presented here, and approved a charge of the trial court that "mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession." *Fowler* and *Cantrell* stand for the same proposition, and in *Matthews* there was no evidence of defendant's presence. These three cases were reversed for a complete lack of evidence to warrant verdicts of guilty, and none of them compel reversal here.

Aside from the identification of Crumley previously referred to, the evidence showed that he was driving a car which contained sugar and bran remnants and fruit jar labels toward the still when he sighted an agent's car and attempted to flee before he was arrested. This presents a much stronger case than those showing no more than mere presence at or approach to a still location and a reasonable explanation therefor.

Petitioners re-urge their contention that the charge was erroneous in part and the jury was free to apply either the correct or incorrect principle on aiding and abetting. This position is without merit, and we reiterate that the instructions as a whole were complete and substantially correct, and could not have confused the jury.

The petition for rehearing is DENIED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22157

HAROLD FRANKLIN SMITH and AUBREY LEE CRUMLEY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 1, 1966; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 1, 1966 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 1, 1966, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Reynaldo G. Garza
United States District Judge.

Dated: April 8, 1966
(Original Filed—April 11, 1966).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22157

D. C. Docket No. 2215-Criminal

HAROLD FRANKLIN SMITH and AUBREY LEE CRUMLEY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 3, 1966

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1271

HAROLD FRANKLIN SMITH AND AUBREY LEE CRUMLEY,

PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinions of the court of appeals affirming the convictions (II R. 161–163;[1] Pet. App. 1–3) and denying the petition for rehearing (II R. 175–177; Pet. App. 4–6) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1966 (II R. 165; Pet. App. 8). A petition for rehearing (II R. 166–174) was denied on April 1, 1966, and the petition for a writ of certiorari

[1] "R.", preceded by volume number, refers to the two-volume record on file with the Clerk of this Court.

219-371—66

was filed on May 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions.

2. Whether the court's instruction to the jury on aiding and abetting was correct.

STATEMENT

Petitioners were convicted in the United States District Court for the Middle District of Georgia on various counts charging violations of the Internal Revenue laws relating to distilled spirits. Each petitioner was sentenced to serve a total of two years' imprisonment (I R. 145–150).[2] The court of appeals affirmed, *per curiam* (II R. 161–163).

The pertinent evidence shows that at about 2:15 a.m. on the morning of March 6, 1964, Alcohol Tax agents, pursuant to a nighttime search warrant, raided a large operating still located in a barn a few miles from Athens, Georgia (I R. 16–27, 28–29, 48, 50, 56–59, 74–75, 78–80). Two of the agents testified that before they entered the barn, they looked through holes in the walls and saw petitioner Smith stirring a "mash

[2] The indictment contained seven counts and named six defendants (I R. 1–4). Petitioner Smith was convicted on all seven counts (I R. 148) and sentenced to concurrent two-year (counts 2, 4, 6) and 12-month (counts 1, 5 and 7) sentences (I R. 148–149). Petitioner Crumley was convicted on counts 2–4, 6 and 7 and sentenced to concurrent two-year (counts 2–4, 6) and 12-month (count 7) terms (I R. 149–150). The trial court acquitted Crumley on count 5; he was not named in count one (I R. 150–151).

barrel inside of the distillery, with a long handled tool" (I R. 58, 75, 78–79).[3] Stirring is necessary to eliminate residue before the mash can be put into the still pot to cook (I R. 61, 79–80). As the officers broke into the barn, Smith sought to escape through the back, but was arrested before he could get away (I R. 58–59). A box of Smith's clothes was also found in the barn (I R. 50–51, 63).

About ten minutes after the raid (approximately 2:40 a.m.), an automobile drove up toward the distillery. When it was within 30 or 40 yards of the barn, its lights shone upon one of the government vehicles. The car was then quickly shifted into reverse, it backed rapidly down the road and was inadvertently driven into a ditch. At this point, the driver and passenger emerged and began to run. After a short chase, the driver, who was petitioner Crumley, was apprehended (I R. 82–83). The automobile was then searched and, in the trunk, the agents found sugar, wheat bran remnants, and some "Atlas" fruit jar labels (I R. 84). During the surveillance at the distillery earlier that evening, the agents had seen men unloading bags of sugar and cases of "Atlas" fruit jars from a large truck into the barn and its adjacent structures (I R. 18–19).

A local tax official testified that the previous January she had sold a license tag for the delivery truck to a man she identified as petitioner Crumley (I R. 67, 97, 99). On cross-examination, the witness

[3] A third agent testified that when he looked into the barn through another hole, he saw petitioner "walking about over among the fermenters" (I R. 27), but could not see him at all times from his vantage point (I R. 50).